THE RICE COMPANY,	)	**AGBCA No. 2003-188-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

June 13, 2005

BEFORE POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK.

In this appeal, The Rice Company (Rice or Appellant) of Roseville, California, seeks $147,267.28 in liquidated damages from the Commodity Credit Corporation (CCC or Government), Kansas City, Missouri. The appeal arises out of the delivery and purchase of milled rice for use in export programs by CCC through its Kansas City Office (KCCC) and by the United States Agency for International Development (USAID). Rice claims that CCC's failure to issue Notices to Deliver (N/D's), in the time frame provided in the contract between CCC and Rice, entitles Rice to the payment of liquidated damages. The CCC Contracting Officer (CO) denied the claim by final decision dated July 3, 2003, where he found that the delay in issuing the N/D's was due to causes beyond the control and without the fault or negligence of CCC and, therefore, pursuant to Articles 2 and 65 of the contract between CCC and Rice, CCC was not required to pay liquidated damages. The CO also found that Appellant had failed to show that it was prepared to ship the cargo at the time of the originally scheduled delivery and thus failed to provide information that was a contractual prerequisite to any recovery by Rice of liquidated damages.

The Board has jurisdiction to decide the appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. The parties elected to proceed on the record pursuant to Board Rule 11 and supplemented the record through affidavits.

FINDINGS OF FACT

1. On September 4, 2002, under Announcement MR17, Invitation 092, CCC awarded Appellant Contract No. VEPD03667. The contract called for Appellant to supply 9,750 metric tons of rice for eventual shipment to Indonesia. (Appeal File (AF) 4-5.) According to Appellant, the rice was to be shipped as follows:

4,350 metric tons	to ship by rail	October 6-October 20, 2002
2,900 metric tons	to ship by rail	October 21-November 5, 2002
1,000 metric tons	to ship by truck	October 21-November 5, 2002
1,500 metric tons	to ship by truck	November 6-November 20, 2002

CCC does not contest that schedule. A metric ton is equal to approximately 2,204.6 pounds. As described by Appellant in its brief and by the District Court in its Memorandum Opinion in American President Lines, Ltd. v. United States Agency for International Development, Civil Action 02-01878 (HHK) (D.D.C. Oct. 11, 2002), USAID implements a humanitarian food aid program pursuant to Title II of the Agriculture Trade Development and Assistance Act of 1954, 7 U.S.C. §1721-1726b. To conduct the program, USAID works with cooperating sponsors such as non-profit organizations and other public and private entities. The cooperating sponsors handle the details of implementing the projects in various nations, including the procurement of ocean transportation for the food aid, by use of freight forwarders. The contracts between the freight forwarders and the ocean carriers are arranged through a competitive bidding system overseen by USAID. American President Line (APL) participated in competitive bidding for the delivery of commodities at issue, by submitting a bid to Wilson Logistics, Inc. (Wilson). CCC was not involved in that process. The Kansas City Office of Commodity Credit Corporation (KCCC) procures and supplies commodities for CCC inventory for food assistance programs, such as the USAID program, described above. CCC contracts with a supplier of the commodity, such as Rice, for the shipment of the commodity to the freight forwarder working with USAID or working with the USAID sponsor. CCC's contract, with suppliers such as Rice, calls for CCC to issue the supplier a N/D at least 7 days prior to the period scheduled for shipment. The N/D not only tells the CCC supplier when to ship, but also tells it where. APL was not the successful bidder to Wilson on the shipment to Indonesia of commodities that are the subject of the CCC/Rice contract. Because APL was not successful, Wilson planned to award the contract to another shipper. That planned award was stopped, however, due to issuance of a Temporary Restraining Order (TRO), which APL secured against Wilson and which we address in more detail below. (AF 1, 8.)

2. Pertinent provisions in the contract between CCC and Rice are set out below:

Article 2. DEFINITIONS

(j) "Causes" as used in the phrases "causes beyond the control and without the fault or negligence" means, but is not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; however, in every case, the failure to perform must be beyond the control and without the fault and negligence of the party to the contract seeking excuse from liability.

(AF 1.)

Article 56. SHIPMENT AND DELIVERY

(a) The ASCS Commodity Office shall issue a Notice(s) to Deliver at least seven days prior to the first day of each period scheduled in the contract for the shipment from origin of a specified quantity of the commodity. Any modification of such period must be made by agreement with the applicable Contracting Office. Such period or any modification thereof is hereinafter called "the contract shipping period." The date on which the Notice to Deliver is issued shall be shown thereon. Contractor shall ship in accordance with instructions in the Notice(s) to Deliver, except that (1) if a Notice to Deliver is issued less than seven days prior to the first day of the contract shipping period, such shipping period and each subsequent consecutive shipping period under the contract directly affected by the delay shall be extended by the number of days such Notice is issued late; and (2) in any event, Contractor shall be allowed the number of business days contained in the period specified in the contract for shipment of the contract quantity, beginning with seven days after the Notice to Deliver is issued. Notwithstanding the foregoing, Contractor shall not be entitled to any extension of the contract shipping period under this Article 56(a) unless it furnishes evidence satisfactory to Agency that it was prepared to ship during the contract shipping period.

(AF 1.)

ASCS means the Agricultural Stabilization and Conservation Service of USDA. (AF 1.)

Article 65. COMPENSATION FOR LATE MAILING OF NOTICE TO DELIVER

Failure to mail a Notice to Deliver in accordance with the terms of the contract may result in delays in shipment and damages to contractor. Because it will be difficult to prove the amount of such damage, Agency shall pay to Contractor as liquidated damages for causing delay in shipment by late mailing of Notice to Deliver an amount to be specified in the announcement for each day of such delay in shipment not to exceed the number of days by which the Notice to Deliver was mailed late. It is

> mutually agreed that such damages are a reasonable estimate of the probable actual damages that may be caused by late mailing of such Notice(s). Contractor's claim for payment of damages for delays with respect to the shipping period for which a Notice to Deliver was mailed late must be supported by evidence satisfactory to Agency that Contractor was prepared to ship in accordance with shipping schedule.
>
> If the delay in shipment caused by the late mailing of a Notice to Deliver causes delays in other shipments in later shipping periods, under the same contract, Contractor may claim liquidated damages for delays in the other shipments occurring during the later shipping period, if it furnishes evidence satisfactory to Agency that it could not, without disruption of normal business operations, complete shipments as required under the contract shipping schedule or any extension thereof by Agency. Agency shall not be liable for liquidated damages under this section if Agency determines that, at the time of Notice to Deliver is to be mailed, such mailing would be impracticable because a condition specified in Article 2(j) of this document exists, or is likely to exist, which could prevent either shipment by Contractor or acceptance by consignee. In such cases, the period for mailing of the Notice to Deliver and shipment of the commodity shall be extended for the number of days that Agency determines such condition exists.

(AF 1.) (Emphasis added.)

3. In addition to the above, the contract also incorporated the Announcement and with it the pertinent provision set out below:

> ANNOUNCEMENT MR17 PURCHASE OF MILLED RICE FOR USE IN EXPORT PROGRAMS.
>
> 12. LIQUIDATED DAMAGES
>
> A. Compensation to Contractor for Late Issuance of Notice to Deliver
>
> Liquidated damages for delay in shipment due to late issuance of N/D will be payable in accordance with Article 65 of USDA-1, and will be at the rate of $0.10 per 100 pounds (net weight) per day.

(AF 2.)

4. On September 26, 2002, APL contested the ocean freight contract award by the private freight forwarder Wilson and filed a request for a restraining order in the U.S. District Court for the District of Columbia. The suit sought to restrain USAID from permitting Wilson to award contracts for the transportation of cargo pursuant to Invitation 092. American President Lines, Ltd. v. United States Agency for International Development. (AF 8.) Award to a carrier determined the location of

the port for shipment (AF 1). On September 27, 2002, the court granted a TRO in favor of APL. As described by Appellant in its reply brief, the TRO enjoined AID, and "all persons acting in concert with them, including but not limited to Wilson Logistics, Inc., from awarding any transportation contract or allowing Wilson Logistics, Inc., to award any transportation contract, under the Wilson Logistics, Inc., solicitation pursuant to invitation 092." It is undisputed that CCC was not a party to the action in which the TRO was issued, nor did the TRO specifically enjoin CCC from issuing N/D's. (AF 8.)

5. According to Appellant, on September 27, Ms. Debbie Martinek, Export Operations Division of KCCC, notified Appellant of the restraining order. The record further shows that on September 27, 2002, Ms. Martinek wrote to Appellant, as well as spoke with Jeremy Springer of Rice, about the fact that the restraining order was issued. She advised Mr. Springer that a hearing date was set for October 4. In Ms. Martinek's letter, she stated that the cargo could not legally be booked until the court hearing was concluded. She said Rice's contract for Indonesia included 9,750 tons "basis bridge" Beaumont. She said CCC would advise Rice as to results and the N/D's were not to be issued at that time. She then stated that it was CCC's intention to work with the suppliers to extend the shipment period in order to accommodate this setback. (AF 6.)

6. On or about October 1, 2002, USAID filed a motion to dismiss the complaint and to vacate the temporary restraining order. Appellant asserts that of particular importance to this proceeding is a Declaration of Nelson Randall, Chief of Processed Commodities Branch of USDA, which was filed by USAID with the District Court to support vacating the order. Mr. Randall's affidavit provided, in pertinent part, the following:

> 2. The rice purchased for Invitation 092 for Indonesia, in the total amount of 12,450 metric tons (MT) was procured from three separate rice suppliers. The rice suppliers purchase the rice from farmers, mill the raw rice to put it in edible form, and then ship the commodity to designated loading ports.
>
> 3. Under the terms and condition of Invitation 092 the delay in booking this cargo will result in liquidated damages being assessed by the supplier to the P.L. 480 program. According to Article 65 of USDA-1 (standard provisions incorporated into all USDA commodity procurement transactions) the "Agency shall pay to Contractor as liquidated damages for causing delay in shipment by late mailing of a Notice to Deliver an amount to be specified in the announcement for each day of such delay in shipment not to exceed the number of days by which the Notice to Deliver (ND) was mailed late." The ND is the document used by this office to advise the supplier where to deliver the commodity. Therefore, in order for the ND to be issued, the cargo must be booked and a delivery point named by the steamship line in order to position the cargo. Consequently, my office cannot issue the ND to the suppliers for the 12,450 MT shipment to Indonesia until we know exactly where the suppliers are to make delivery of the rice. The U. S. Delivery location, in turn, is based on which steamship line receives the award.

> 4. Under Invitation 092 the ND was to be issued September 28, 2002. Liquidated damages are assessed in accordance with Announcement MR-7 (announcement governing and incorporated into all USDA rice purchases for P.L. 480 programs) at $0.10 per 100 pounds (net weight) per day. These damages total $12,764.63 per day, for a total of $89,352 by October 4, 2002.
>
> 5. My office purchases commodities for the USAID Title II food aid program based on a fixed appropriation. Therefore, for every dollar spent on liquidated damages, my office has one less dollar with which to purchase food aid for USDA's Title II program.
>
> 6. USDA's Foreign Agricultural Service, which administers the P.L. 480 Title I program, currently has a Title I invitation open to the public for 100,000 MT of milled rice for delivery November 5 through December 30, 2002. A delay in delivery of the milled rice on Invitation 092 may result in any or all of the three Invitation 092 supplier's inability to bid or produce for the Title I program. This is a result of the fact that suppliers' milling time has already been booked for a specific time to accommodate the 12,450 MT of rice from the 092 Invitation. Thus, because of limited storage and milling facilities, any delays associated with Invitation 092 may force a restructuring of the shipping period for subsequent orders of rice. This, in turn, could lead to reduced competition and/or delivery delays associated with the open Title I invitation.

7. On October 6, 2002, Ms. Martinek sent a memorandum to Appellant advising that a decision was due to be issued by the judge on October 9. She stated, "We realize that this problem has caused scheduling problems for our suppliers, and remind you that it is our intention to work with you on the delivery of this cargo." (AF 7.)

8. The restraining order was lifted on October 11, 2002, as the court granted USAID's motion to dismiss (AF 8). On the same day, the Government sent notice to Appellant issuing "Shipping Instructions in lieu of Notice to Deliver" (AF 9). According to Appellant, the USDA issued a N/D for the first lot, 12 days after Appellant should have received its N/D (VEPD0023894), pursuant to the original schedule. Appellant further charged that not only was the notice late, but the shipping dates were not extended. (AF 9-10.) The original schedule showed the first shipment date as October 6 (See Finding of Fact (FF) 1).

9. On October 11, 2002, Ms. Suzanne Kennedy, then a merchandiser for Appellant, spoke with Ms. Martinek and advised Ms. Martinek that the delay in receiving the N/D was severely impacting Appellant's ability to ship. Ms. Kennedy requested CCC either accept the product that Appellant had already shipped and extend the shipment period to January 15, 2003, for the unshipped product; or alternatively, accept the product already shipped and tendered to KCCC, and cancel the balance of the contract under the circumstances. More specifically, Ms. Kennedy said, "Prior to my receipt of the first NOD, I spoke with Deborah Martinek of the KCCC and explained the impact the delay was

having on our ability to ship. I spoke with Ms. Martinek on October 11, 2002, and advised her that TRC was incurring demurrage charges and experiencing extreme difficulty in connection with other shipments. I further requested, that either CCC accept the product already shipped and extend the shipment period to January 15, 2003 for the unshipped product, or accept the product already shipped and tendered to KCCC and cancel the balance of the contract under the circumstances." The reference TRC refers to The Rice Company and NOD is reference to the Notice to Deliver (N/D). (Affidavit (Aff.) Kennedy, para. 3.)

10. Thereafter, on October 16, 2002, Ms. Kennedy sent CCC an additional letter. In that letter she stated that on that day, Rice had received the N/D on the first lot of 4,350 MT. She stated that Rice had not received an N/D for the second and third lots that Rice had expected to receive during the prior week. She then said:

> Problems have arisen surrounding this invitation, independent of Rice Company, which have resulted in major delays to the shipping periods as originally contracted. During this time period, Louisiana has encountered a major hurricane, the origin state of most of the product being shipped under the contract, creating a loss of more than two weeks in milling time. In addition to the stress on milling time caused by the hurricane, the delays have put us outside the origin [sic] shipment dates and have severely affected our shipment schedule.
>
> The balance of approx. 6,250 MT that remains to be shipped is now interfering with additional business we have scheduled for Last-half of October, November and December shipment periods, specifically commercial business and 21,000 MT we have sold to USDA through the PL-480-Title I program to Indonesia and the Phillippines.
>
> The delays and problems surrounding this contract have placed us in a very difficult position and we have incurred damages as a result.

(AF 14.)

11. She then requested that CCC accept the product already shipped and extend the shipment period to January 15, 2003, for all unshipped products; or accept product already shipped and tendered to KCCC and cancel the balance of contract. (AF 14.) This essentially repeated the same request she had made in her October 11, 2002, conversation with Ms. Martinek (Aff. Kennedy, para. 3).

12. By fax transmittal, the business entity, Port of Beaumont, contacted USDA. The fax stated, "As per your voice mail, please find the attached list of rail cars." The listing, set out on a separate page, included the date shipped from the mill (the typed date above each group of cars) and the arrival at the port date. At the upper left hand corner of the page it showed Supreme Rice Mill, USDA Port Allocation 092. The shipping dates ranged from September 20, 2002, to October 10, 2002.

There were ten separate listings, with all but the October 10, 2002, shipment showing an arrival date at port. Finally, handwritten (at the bottom of the page) was the e-mail address for Mr. Reaman, with no first name shown. (AF 13.)

13. By letter October 17, 2002, the CO at KCCC, Timothy Reaman, denied Ms. Kennedy's request (AF 15). He said that through several phone calls between Ms. Martinek, with another CCC official, and with Ms. Kennedy (on October 11), Ms. Kennedy requested assistance from the KCCC office for relief involving the shipment of 2,000 metric tons to be shipped from the Beaumont Rice Mill. The CO said that late Friday, Ms. Kennedy was advised that the temporary restraining order had been lifted and the cargo would be booked with Sealift and Rice could immediately begin delivery to Port of Beaumont. The CO said that based on a telephone call with Ms. Martinek on October 16, Ms. Kennedy agreed Rice would ship 7,000 MT of milled rice to Port of Beaumont by November 15, 2002. The CO said that based on this, it was booked. He said that due to late issuance of N/D's, CCC will extend shipping periods by the number of days that the N/D's were late. Based on his calculations CCC extended the 4,350 MT's to be shipped from October 6 to October 20, to November 4. The CO said the balance of the contract, 2,750 MT, was open to further discussion as to when it could be made available. He said he expected Rice to deliver the 7,000 MT's. (AF 15.)

14. On October 17, Ms. Kennedy faxed Ms. Martinek and stated Appellant would make every effort to ship the 7,000 MT's by November 20. She then stated, "We cannot emphasize enough the problems surrounding this contract as a result of your delay in issuing Notices to Deliver, which directly impact shipment schedules and will make our performance exceedingly difficult." She went on to state, "We reserve all our rights under the contract, including but not limited to a claim for liquidated damages to compensate The Rice Company for the losses sustained due to the delays." She then addressed the balance of 2,750 MT's. She said that the delays have created such a situation that it would be commercially impracticable for Rice to ship under the current schedule. She requested CCC's agreement to cancel this balance of its contract. (AF 16.)

15. The CO then sent a letter of October18, in which he acknowledged Ms. Kennedy's fax of October 17 and what he characterized as Rice's intent to ship 7,000 MT's. The CO then listed a breakdown of shipments to be made against N/D's. Those were as follows:

VEPD0023894	4,350 MT	October 6-20, 2002 (Extended to Nov. 4th)
VEPD0023896	1,000 MT	October 21-November 5, 2002 (Extended to Nov. 8th)
VEPD0023897	1,500 MT	November 6-20, 2002
VEPD0023904	150 MT	October 21-Nov 5, 2002 (Extended to Nov. 9th)

(AF 18.)

16. In this October 18 letter, the CO said he was aware that 3,500 MT's had been shipped early against shipment order VEPDOO23894 from Supreme Rice Mill, in Crowley, Louisiana, and the railcars were being unloaded at Beaumont. The CO said he needed information on the remaining 3,500 MT's. He then said, as to the remaining 2,750 MT's to be shipped against this contract, it was CCC's position that Rice should take whatever steps necessary to fulfill their obligation to ship under the contract terms. He said that as discussed at length, they (CCC) were willing to work with Rice to allow for delivery of a portion of the contract. (AF 18.)

17. On that same day, October 18, Appellant faxed a communication to the CO. In it, Appellant said that it had received two notices to deliver, one which had manual changes. Appellant asked for clarification. Appellant then asked for CCC to return a listing of all N/D's that had been issued and the tonnage that applied to each. (AF 20.)

18. On that same day, October 18, CCC provided the requested listing. The listing was identical to that earlier listing provided in the October 18 letter set out in FF 16, above. In addition, the CO explained the manual inclusion. He stated, "The above listing of the N/D's (7,000 metric tons) are the shipments for which we are awaiting your reply by C.O.B. today." (AF 21.)

19. It then appears that there was a fax to CCC from Appellant dated October 22, a copy not provided by either party. We know of the fax because Appellant followed up on it, when it asked by fax for CCC to confirm that the shipment period for 2,750 MT's (the remaining tonnage after the 7,000) on subject contract be extended to February 15, 2003. (AF 22.) The CO replied on October 25 saying the program agencies were unwilling to agree to a February date to meet the needs of the program, but CCC was able to get the program agencies to agree to a January 15 date. The CO then stated that "Notice to Deliver VEPD0023895 for this 2,750 metric tons had an original delivery period of October 21 through November 5, 2002." He stated that the N/D was actually faxed to Rice on October 18, 2002. He then stated that in accordance with Article 65 of USDA-1 the shipping instructions should have been sent to Rice on October 14 to allow seven days prior notice. He continued, "We have added the number of days late to the final shipping date, which in this case would be November 10, 2002. Your fax letter of October 16, stated that you could meet a January 15 date. We agree to work with you to deliver the balance of this contract (2,750 metric tons) by January 15 date as originally stated." (AF 23.)

20. Ms. Martinek then wrote to Rice on November 20, 2002. In that correspondence, CCC was following up a telephone conversation of that date. The correspondence reflected that Nelson Randall, who was Chief of the Processed Commodities Branch, Export Operations Division, Farm Service Agency, had approved an extension through November 20, 2002. The approval was for 7,000 MT's (N/D's VEPDOO23894, 23896, 23897, and 24159). Ms. Martinek stated that the remaining 2,750 metric tons that were to be shipped with Maersk (N/D of VEPD 0023895) had been extended through January 15, 2003. (AF 24.)

21. On January 3, 2003, Appellant filed a written claim (AF 25). In it, Appellant claimed it was entitled to $147,267.28 in liquidated damages. Appellant stated that at various times throughout the

contract, CCC failed to issue timely N/D's, which directly impacted shipping schedules causing significant monetary loss to Rice. Rice broke the claim down as follows:

1. $115,080.12 for 4,350 metric tons where the N/D was 12 days late (N/D number VEPD0023894). It was received on October 11, 2002. Appellant says the pre-advise date was September 29.

2. $1,322.76 for 150 metric tons where N/D was 4 days late (N/D VEPD0023904). It was received October 18. The pre-advise date was October 14.

3. $24,250.60 for 2,750 metric tons where the N/D was 4 days late (N/D VEPD023895). It was received October 18. The pre-advise date was October 14.

4. $6,613.80 for 1,000 metric tons where the N/D was 3 days late. (N/D VEPD0023896). It was received October 17. The pre-advise date was October 14.

22. On July 3, Mr. Randall, identified in the letter as the CO, issued his final decision on Appellant's claim (AF 26). He did not materially dispute the information as to tons and as to the delivery notice dates set out in Appellant's January 3 letter. He described the commodity shipping period as follows:

4,350 October 6-October 20
3,900 October 21-November 5
1,500 November 6-November 20

The difference, between Mr. Randall's listing which shows 3 dates, and the 4 dates used by Appellant in its claim, is due to Mr. Randall combining several orders in his total of 3,900 MT's. (AF 26.)

23. In his decision, the CO stated that on or about September 20, 2002, and through October 2, 2002, Rice, through its subcontractor, Supreme Rice Mill, shipped 2,745 metric tons by rail to Port of Beaumont. He pointed out that this was well in advance of the authorized shipping period of October 6-20. The CO then addressed the request for a temporary restraining order by APL and how it affected shipments. He stated that on October 11, the contractor requested and was granted approval to begin trucking 2,000 metric tons to the Port of Beaumont and on that same date, once the KCCC office was advised of the lifting of the order, the KCCC office sent a wire facsimile in lieu of a N/D to the contractor. The CO continued that the Appellant asked for numerous extensions to the shipping periods and the contracts were modified with the final shipping period extended to January 15, 2003. (AF 26.)

24. The CO cited Article 65 of the contract and stated that CCC was prevented from issuing a N/D to Appellant, because of the TRO that had been in effect from September 26 through October 11 (15 days). The CO said the government could not issue the N/D's because the KCCC did not know which party would prevail in the litigation and the outcome would affect the delivery point. He then stated, "The government, and the Contractor must know the delivery point before N/D's can be issued." He then stated that CCC was not liable because "causes" existed which precluded CCC from issuing the N/D during the time period. He continued that the issuance of a TRO barring execution of the ocean freight contract is an action of the government in its sovereign capacity and excuses the late issuance of the N/D. He then concluded that the period for mailing the N/D was extended 15 days by operation of Article 65. (AF 26.)

25. The CO then addressed and denied the three claims arising out of delays in issuing N/D's after October 11. He stated:

> Further, Article 65 of USDA-1 contains several references to "delays in shipment" and indicates that delays in shipment may result in liquidated damage, but not to exceed the number of days the N/D's were mailed late. Article 65 indicates that in asking for these liquidated damages, the Contractor must provide evidence satisfactory to the Agency that the Contractor was prepared to ship in accordance with the shipping schedule. Taken as a whole, these provisions provide that as a prerequisite to the claim for liquidated damages the Contractor must have suffered actual delays in shipment and the Contractor must show the cargo was ready for shipment.

(AF 26.)

26. The CO then concluded, in the case of these three N/D's, the shipments were not delayed and the Contractor did not have the cargo ready for shipment. He went on, "In fact, as to these three shipments, the Contractor sought extensions for the delivery time because of its inability to supply the cargo." He then stated that on that basis he found insufficient evidence to support the contractor's claim for liquidated damages. In addition, he also stated that the Agency was under a restraining order for 15 days, meaning that any claim for liquidated damages under Article 65 must exceed 15 days. He pointed out that the three instances all involved less than 15 days. (AF 26.)

27. On August 19, 2003, Appellant filed a timely appeal at this Board. On September 30, it filed its complaint. It stated at Paragraph 3 of the Complaint that "at various times throughout this contract, CCC has failed to issue timely Notices to Deliver which directly impacted shipping schedules causing significant monetary loss to the Rice Company."

28. Thereafter, the parties engaged in discussions but were unable to reach any agreement. As part of the processing of the appeal, the Board held a telephone conference with the parties on March 25, 2004, to discuss scheduling and more specifically the potential testimony from Ms. Kennedy. Counsel for CCC had proposed that in lieu of presenting live testimony, Appellant should file an affidavit, and depending on what was stated, counsel for CCC would then submit

interrogatories. Mr. Brown, counsel for Rice, expressed concerns that if credibility was at issue, it would be important for the Board to see Ms. Kennedy in person. Notwithstanding those expressed concerns, the Appellant and CCC thereafter agreed that the Appellant would submit an affidavit and the Government would have the right to submit a counter-affidavit. At that point, the parties were to confer and advise the Board of the result of those discussions. The Board stated that if either party wanted a hearing, the Board would schedule such, and further noted that depending on circumstances, the matter could be heard in Sacramento, as Rice was located in California. During the conference, the Board did not specifically address supplementing the record; however, the Board did advise Appellant and Government in its letter to the parties, memorializing the conference, that the parties could avail themselves of that opportunity. At that point, it was still not fully decided if a hearing would be held or if the parties would choose otherwise. The Board then identified in a final separate paragraph concerns that the Board had identified during the conference. The paragraph provided:

> Finally, the Board did address some initial concerns. While the Board has not reviewed the record extensively, it does appear that the Government's position is that the appeal essentially turns on the question of whether the contract clause, as to payment of liquidated damages, excludes payment here, as an event not caused or controlled by the Government. If that is the case, then there seems to be little that will be in dispute over testimony. While, the Board did not raise the following in the conference, the Board does recognize that there was some disagreement over whether Appellant was ready to ship or not. In proceeding with their affidavits and documents, the parties may wish to first resolve the matter of the contract defense and proceed with resolving the questions as to readiness, after resolution of the contractual matter. The parties are directed to discuss this aspect of the case within the next 10 days. The Board is willing to proceed in that manner if the parties so agree. Otherwise, all matters will be at issue in the proceeding, be it on the record or following a hearing.

29. The Appellant then proceeded to secure an affidavit from Ms. Kennedy, who was no longer employed by Rice. Appellant initially ran into problems in locating her, however, after some extensions it did secure the affidavit. The affidavit was signed on June 4, 2004, and then provided to the Board and to CCC. A portion of that affidavit has been cited in the earlier findings of fact. In addition, Ms. Kennedy provided some other statements, the principal of which, we set out below. At paragraph 2, she stated, "Under the contract, CCC must issue a Notice to Deliver (NOD) prior to the first day of each period for scheduled shipment. In anticipation of the Notices to Deliver, TRC made arrangements to transport the rice by railcar and truck from Eunice Rice Mill." She then stated that the KCCC had failed to advise Rice of the restraining order until Rice was already within the pre-advise period. She stated that the N/D received on October 16 had been anticipated by Rice to be delivered no later than September 28. She stated that prior to the receipt of the first N/D, she spoke with Ms. Martinek and explained the impact the delay was having on Rice's ability to ship. She said she advised her that Rice was incurring demurrage charges and experiencing extreme difficulty in connection with other shipments. She then described the requests which were reflected in letters already addressed in this opinion. She stated that KCCC refused her request and insisted on shipment

by November 20, which forced Rice to incur demurrage charges and additional transportation costs which could have been avoided had KCCC complied with Rice's request to extend the shipping period to January 15, 2003. She then repeated, as a result of KCCC refusal to cooperate reasonably with Rice in extending the shipping period for more than the time granted, Rice experienced a significant impact in its shipping schedules, resulting in significant expense of employees' time and resources in attempting to comply. She further noted that in addition, TRC incurred demurrage charges from BNSF in the amount of $39,825 and because Rice shipped outside of the period, it had to contract out the shipping at a premium price, at an approximate cost of $1.00 per cwt. (Aff. Kennedy, June 7, 2004.) Appellant provided no further data to amplify her statements as to the "significant impact" on Rice's shipping schedule and no information to establish that the rice had been ready to ship at the time the N/D was delayed.

30. On June 8, 2004, the Board received a letter from counsel for CCC. He stated that he had reviewed the Declaration (Ms. Kennedy) and Appeal File again, and did not believe there were many factually dispositive issues necessitating a hearing. He said the Government believed that the resolution involved legal interpretations and contract provisions and their application to facts which were not in dispute. On June 10, the Board received a letter from Appellant's counsel. He stated that he agreed the matter was suitable for adjudication without a hearing. He then requested that Rice be permitted to submit supplementary declarations, if necessary, upon receipt of the Government's counter-affidavits. He also wished to supplement with additional documentation of damages by Ms. Kennedy. The Board agreed.

31. On June 24, CCC provided an affidavit from Ms. Martinek. In pertinent part she stated that on the day the court order was vacated, she issued a shipping wire to Rice giving the instructions and N/D number that would be applied to the first shipment of 4,350 metric tons of milled rice. She said she was in contact with Ms. Kennedy and Mr. Springer of Rice several times during the afternoon of October 11 and it was agreed that they could begin shipping to the Port of Beaumont. She then referred to supporting documents from Supreme Rice Mill, Inc, which she says reflects that Rice shipped 38 rail cars prior to the October 6 shipping period. She stated that any demurrage that were incurred prior to the shipping period are the sole responsibility of the contractor. She said the cars were shipped outside the contracted shipping period without written instructions from the government.

32. Ms. Martinek continued, that during her telephone conversations on October 11 with Rice, she advised them that 7,000 metric tons were booked with a charter vessel for the Port of Beaumont and must be received at the port no later than November 15, 2002. She pointed out that the shipment was extended to November 20. She said the extension was actually a thirty day extension for the N/D's scheduled to ship October 6 through October 21 and a fifteen day extension for those that were to ship from October 21 through November 5. She essentially confirmed Ms. Kennedy's charge that the extension was denied because the shipment was booked firm with a charter vessel. She said that accordingly, the extension could not be granted. She pointed out that the shipping period for the remaining 2,750 metric tons was extended through January 15, 2003, which she stated was 2 months

later than the original request on the N/D. She stated that she believed the extensions given were reasonable. (Aff. Martinek.)

33. On July 8, 2004 the Board held another conference. In response to Appellant's earlier request, the Board advised Appellant that it could submit a reply to Ms. Martinek's affidavit. The Appellant indicated that the reply would also address damages. The Board specifically stated that it would give the Government the right to reply to any damages information, but any other Government response to Ms. Kennedy would require Board permission. The briefing schedule and final submission schedule was set.

34. On September 9, 2004, Appellant submitted a Reply Affidavit from Ms. Kennedy. This reply stated, "The Rice Company shipped based on Notice to Deliver being issued in a timely manner. Had the Notice to Deliver been issued on time, The Rice Company would not have incurred such extensive demurrage charges." She also stated, that she disagreed with Ms. Martinek's assertions that the extensions provided were reasonable. Again, but for her statement, there was no supporting data to contradict CCC's contention, set forth in the CO's decision, that Rice had failed to show that the rice was ready to ship at the time the original notice was to be delivered. (Reply Aff., Kennedy.)

35. The parties each filed opening and reply briefs. In its opening brief, the Appellant referred to the affidavit provided by Mr. Randall during the District Court proceeding on the TRO, where Mr. Randall represented to the court that CCC would be liable for liquidated damages because of the delays in the delivery of N/D's.

36. On December 22, 2004, the Board received a letter from Appellant where it said, "In response to the Government's Reply Brief and to the extent deemed necessary by the Court, Appellant respectfully requests that it be allowed to augment the record by incorporating the affidavit of Nelson Randall referenced in Appellant's Opening Brief and Reply Brief. The document had been discovered by Appellant during a search of the District Court records through PACER, during the time Appellant was preparing its Opening Brief." It stated it did not know why the affidavit had not been included in the CCC record. CCC through counsel responded and objected to adding the document, saying Appellant had its chance.

37. The Board has determined to allow in the affidavit. There is no question that CCC was clearly aware of its existence. Moreover, this is the type of document that could have been included by the government in an Appeal File. The purpose of the Appeal File is not to put the best face forward for the government, but rather to identify documents in the government files which directly relate to the issues in dispute.

DISCUSSION

TRO DELAYED N/D

Article 65 of the contract provides for payment for damages due to late delivery of N/D's. It also specifies in pertinent part:

> Agency shall not be liable for liquidated damages under this section if Agency determines that, at the time of Notice to Deliver is to be mailed, such mailing would be impracticable because a condition specified in Article 2(j) of this document exists, or is likely to exist, which could prevent either shipment by Contractor or acceptance by consignee. In such cases, the period for mailing of the Notice to Deliver and shipment of the commodity shall be extended for the number of days that Agency determines such condition exists.

Article 2(j) provides:

> (j) "Causes" as used in the phrases "causes beyond the control and without the fault or negligence" means, but is not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; however, in every case the failure to perform must be beyond the control and without the fault and negligence of the party to the contract seeking excuse from liability.

(FF 2.)

In this case, a Federal District Court issued a restraining order which barred the execution of an ocean freight contract and put into limbo by whom and from what location ultimate shipment would be made. CCC could not issue an N/D without the necessary information, unavailable because of the TRO. As pointed out by Mr. Randall in his District Court affidavit:

> The ND is the document used by this office to advise the supplier where to deliver the commodity. Therefore, in order for the ND to be issued, the cargo must be booked and a delivery point named by the steamship line in order to position the cargo. Consequently, my office cannot issue the ND to the suppliers for the 12,450 MT shipment to Indonesia until we know exactly where the suppliers are to make delivery of the rice. The U. S. Delivery location, in turn, is based on which steamship line receives the award.

(FF 1, 4, 6 (para. 5).)

Similarly, in the CO final decision letter of July 3, 2003, Mr. Randall stated, "the government could not issue the N/D because the Kansas City Commodity Office did not know which party would prevail in the litigation, as the outcome would affect the delivery point." (FF 26).

No one has suggested that the TRO or the conditions leading up to it were due to the fault or negligence of CCC, that CCC caused the issuance of the court order or that CCC could control the court proceeding and the TRO. Appellant has contended that CCC was not bound by the court order and as such was free to act and thus was not prevented from releasing the N/D's. Appellant characterizes the CCC action as voluntary and thus does not believe it falls under the clause. It cites the Board to 15 U.S.C. § 714b which provide the Corporation, "May sue and be sued, but no attachment, injunction, garnishment, or similar process, mesne or final, shall be issued against the corporation or its property."

Appellant concludes, relying on the above, that statutorily CCC cannot be enjoined and since the TRO did not apply to CCC, then CCC is not insulated under Article 65 from liability for liquidated damages. Appellant then cites to the statements in the affidavit of Mr. Randall to the District Court, where Mr. Randall represented that liquidated damages were resulting from the court decision. (FF 6.) We address Mr. Randall's affidavit and its affect in more detail later.

Appellant is correct that the court order did not specifically enjoin CCC (FF 1, 4-8). However, the injunction did directly affect CCC's ability to perform under its contract, as it put into question who was to receive the goods and where and when. Absent court resolution, CCC could not designate the final delivery point to position the cargo, as that could not be established until the TRO was resolved. (FF 6.)

The language of Article 65 provides that CCC shall not be liable for liquidated damages when mailing would be "impracticable because a condition specified in Article 2(j) of this document exists, or is likely to exist." Article 65 further references conditions "which could prevent either shipment by contractor or acceptance by consignee." The language of the contract clause does not limit its coverage to impossible situations or situations where CCC had no other possible alternative. For us to read the clause not to cover the situation in this appeal, would have us read out of the language the wording "impracticable," and have us read out the language as to preventing shipment by contractor or acceptance by consignee. Here, there was a sovereign Government act, an order by the District Court, which called into question who could receive the order and where. The court had forbidden Wilson from taking any action as to an award. Therefore, Wilson could not designate a freighter to whom CCC could direct Rice to deliver. (FF 1, 4, 6.) As Mr. Randall stated in his affidavit to the District Court, the N/D is the document issued to advise the supplier where to deliver the commodity. "Therefore, in order for the N/D to be issued, the cargo must be booked and a delivery point named by the steamship line in order to position this cargo." The U. S. delivery location is based on which steamship line receives the award, this could not be determined while the TRO was in place. (FF 6.) The inability to issue an N/D is one of the contractual bases for excusing late issuance of an N/D. Not knowing where to ship and not having an identified party available to accept the cargo, clearly falls under the category of impracticable. The fact that CCC was not specifically prohibited from shipping does not change that point.

In addition to the arguments addressed above, Appellant relies heavily upon the interpretation of the language of Article 2(j) and 65, as set out in Mr. Randall's affidavit, submitted to the District Court

(FF 6). In briefing, CCC attempts to explain away Mr. Randall's affidavit by stating that Mr. Randall was predicting events that could occur in the future and not necessarily addressing the status of matters, if the TRO was quickly lifted. We do not find those arguments of CCC persuasive. We understand the Randall affidavit to be addressing the time then in play, as well as damages yet to occur. It appears to us that Mr. Randall thought that CCC would be liable for liquidated damages under the clauses of the contract. That is how he represented that he read the clause. (FF 6.)

That being said, counsel for CCC is correct that the fact that Mr. Randall read and interpreted the language in a manner favorable to the Appellant does not necessarily bind CCC, where CCC can show that his interpretation was not correct. We come to that conclusion, however, not because of the cases cited by CCC. CCC supports its position by asserting that there can be no estoppel as to statements made by a Government employee, citing FCIC v. Merrill, 332 U.S. 380 (1947) and OPM v. Richmond, 496 U.S. 414 (1990). CCC contends that the law under these cases establishes that we cannot consider the statements of Mr. Randall as controlling, if they are an incorrect interpretation. The cases cited by CCC involve situations where the person acting on behalf of the Government did not have authority to make the determinations he did. Moreover, the determinations in those cases that were made were found to be in violation of a statute or regulation. Here, the CO made statements interpreting a contract. The CO expressly has the authority to interpret and apply contract terms. Moreover, CCC has not established that Mr. Randall's interpretation would violate any regulation or statute. What we have here is at best is an incorrect interpretation of the contract. Neither of the cases cited by CCC protect the Government from an inaccurate or wrong interpretation of contract language by the CO.

While, we therefore find that the cases cited by Government are not controlling, our analysis does not end there. For the fact is that there is other case law which we find requires that in a case such as this, we must look at the language de novo. The cases hold that we must review the language without giving any presumption to or taking as a legal admission determinations of the CO as to the meaning of language. We can, however, consider such statements factually in assessing whether an ambiguity exists. In that regard, we find ourselves particularly guided by the recent decision in England v. Sherman R. Smoot Corp., 388 F. 3d 844 (Fed. Cir. 2004). That case overturned what has popularly been referred to as the McMullan presumption, which arose out of the appeal of Robert McMullan & Son, Inc., ASBCA 19023, 76-1 BCA ¶ 11,728. In McMullen, the ASBCA had set out that by the Government's action of issuing an extension of the contract delivery date, the Government created a rebuttable presumption that it was responsible for the delay. In Smoot, the Federal Circuit, reversed the "presumption," determining that the presumption was inconsistent with provisions of the CDA which required de novo analysis in resolving appeals. Just as the CO's factual conclusions are not entitled to deference, the CO's legal interpretation is likewise not dispositive.

In England v. Smoot, the court stated that the CDA provides that findings of fact in a CO's final decision are not binding in a subsequent proceeding which is to proceed de novo. Essentially, the court found that de novo review precludes reliance on the presumed correctness of a CO final decision and once an action is brought following a CO decision, the parties start in court or before the board with a clean slate.

In the instant case, we are focusing on statements made by the CO in an affidavit submitted to the court in the TRO action and not a statement made in a final decision. As we understand Smoot, however, the lack of a presumption would still apply. If the determination of a CO in a final decision cannot be presumed to be correct and is subject to a de novo review, then certainly we cannot find a presumption or bind CCC solely on the basis of an interpretation made by Mr. Randall in an affidavit, but which interpretation he later disclaimed in his final decision.

Based on the decision of the Federal Circuit, we find that we do not have a legal requirement or basis to give the statements of Mr. Randall presumptive weight. That does not mean however, that the statements he made lack relevance. The statements are relevant as evidence that we consider (without benefit of presumption) in assessing what the language of the contract provided and whether or not this was a cause which was subject to exclusion from payment of liquidated damages.

We have reviewed and examined the language in Article 65 and Article 2(j). We have taken into account the statements made by Mr. Randall in his affidavit to the court. We also have taken into account the principle of contra proferentum, but find no ambiguity. We find, notwithstanding what Mr. Randall said in his affidavit and notwithstanding contra proferentum, that the provisions of Article 65 and 2(j) clearly exclude liquidated damages in a situation such as this appeal. We find liquidated damages are excluded where the October 11 N/D was delayed due to a TRO which made the mailing of the notice impracticable, as defined by the clause. As we see it, the language of the contract here was not ambiguous or subject to the interpretation being put forth by Appellant. The interpretation one can derive from the CO's affidavit does not change that.

While we find the language clear, the statement of Mr. Randall might have caused a different result, had Appellant shown through evidence that it acted in detrimental reliance on the interpretation put forward by Mr. Randall to the District Court. However, as counsel for CCC has pointed out, Rice has not shown detrimental reliance as a result of Mr. Randall's affidavit to the Court. We agree. We find that the record fails to show the elements needed to establish any detrimental reliance, and as such, that alternative road to relief is not available in this case.

Finally, both parties spent time addressing whether or not the action of the government constituted sovereign acts, with Appellant conceding that if so, then CCC's action might fall under the clause. Appellant, in arguing sovereign acts, states that even if the court action was a sovereign act, before the court grants immunity, it must additionally determine whether the government as contractor should be discharged from liability under the common law doctrine of impossibility, citing United States v. Winstar Corp., 116 S.Ct. at 2469 (1996). The contract language covers impracticability as well as impossibility. We have found the former, impracticability, has been established. Consequently, even if Winstar required, as claimed by Appellant, a showing of impossibility, the contract language here controls. This situation falls under the identified causes excusing late submission of an N/D. Winstar does not alter the result.

THREE POST OCTOBER 11, DELIVERY ORDERS

In addition to the late issuance of the first delivery order, CCC was late on three other N/D's two of which were issued on the same date. These delivery orders were issued October 17 and October 18. (FF 21.) CCC has presented no evidence to show why those N/D's could not have been issued by October 14 (7 days prior to October 21), as was the case with the first N/D. We therefore agree with Rice that these are not covered as excluded conditions, since issuance was not impracticable. Moreover, CCC has presented no evidence to convince us that these orders were dependent upon the earlier order and could not have been issued shortly after the restraining order was lifted. We, therefore, consider these items as separate delays. Given that the order had been lifted and CCC has not provided evidence to explain why the notices had to be late, we find that VEPD0023896 was 3 days late and VEPD0023897 and VEPD0023904 were each delayed by 4 days.

The fact that a delivery of an N/D was delayed however does not automatically result in payment of liquidated damages under the clauses of this contract. Here, in addition to explaining when CCC will pay liquidated damages for delays associated with late N/D's, Article 65, also states in pertinent part, that:

> Contractor's claim for payment of damages for delays with respect to the shipping period for which a Notice to Deliver was mailed late must be supported by evidence satisfactory to Agency that Contractor was prepared to ship in accordance with shipping schedule.

(FF 2.)

The above is a contractual prerequisite to recovery of liquidated damages. The wording is not ambiguous. It clearly states that it is the contractor's responsibility under the contract to show evidence that it was prepared to ship in accordance with the shipping schedule. The Appellant was obligated to respond to the CCC contentions that the cargo was in fact not ready for shipment. (FF 2.)

Here, in his final decision denying recovery on the three late N/D's, the CO specifically stated: "In fact, as to these three shipments, the Contractor sought extensions for delivery time because of its inability to supply the cargo. Therefore, in accordance with USDA-1 and the announcement, I do not find sufficient evidence to support the contractor's claim for liquidated damages." (FF 24-26) Given the above statement, there can be no question that the CO had identified the issue of readiness to ship as an issue that needed to be addressed and satisfied by Appellant, if Appellant wanted the Board to order payment of liquidated damages. Further, in its brief at page 7, Appellant's counsel indicates that Appellant understood the need to address this point. There he said, "As set forth in Article 65 of USDA-1, the contractor must provide evidence that it was prepared to ship in accordance with the contract shipping schedule." Counsel then set out the contract schedules. He then stated that in anticipation of the contract, Rice purchased 3,500 MT of US #5 or better to be shipped September 20 through October 15, 2000, and in fact shipped 2,000 MT before the temporary restraining order. This, however, would at best only establish that at the time of the October 11 delivery, Rice had at

least 1,500 MT (3,500 less 2,000 already shipped) available to ship. The statement that Rice purchased 3,500 MT to be shipped starting September 20 (noting that but for the statement, there is no document or affidavit which so provides) would still only account for the 3,500 MT's associated with the first N/D, which was to be issued on October 11. That quantity, however, would only apply to the October 11 notice, a notice for which we do not find a right to recovery.

While Appellant has acknowledged that the contract required it to establish readiness for shipping at the original dates, what Appellant has provided here, as to the quantity involved in the October 17 and 18 delivery orders, does not even minimally establish that the product (rice) was ready for shipment as to the last three N/D's for which Appellant claims relief. Appellant has contended it was ready to ship but has provided us insufficient evidence. It has provided no more than general pronouncements. We do not have sufficient supporting data to make a credible inference. This is not a situation where we are assessing the reasonableness of the CO's conclusion in assessing the evidence of readiness presented to him. Rather, here the CO, and now the Board, was not given even minimal evidence as required by the contract.

In presenting its defense and arguing that the product was not ready to ship, counsel for CCC cited the Board to Appellant's letter of October 16 where Appellant stated,

> Problems have arisen surrounding this invitation, independent of Rice Company, which have resulted in major delays to the shipping periods as originally contracted. During this time period, Louisiana has encountered a major hurricane, the origin state of most of the product being shipped under the contract, creating a loss of more than two weeks in milling time. In addition to the stress on milling time caused by the hurricane, the delays have put us outside the origin shipment dates and have severely affected our shipment schedule.
>
> The balance of approx. 6,250 MT that remains to be shipped is now interfering with additional business we have scheduled for Last- half of October, November and December shipment periods, specifically commercial business and 21,000 MT we have sold to USDA through the PL-480 Title I program to Indonesia and the Phillippines.
>
> The delays and problems surrounding this contract have placed us in a very difficult position and we have incurred damages as a result.

(FF 10.)

CCC counsel asserts that in the above letter, Appellant was indicating that a hurricane affecting a supplier also played a prominent role in the delay, but now was claiming that the late issuance of the N/D's was to blame. (FF 10.) Counsel then continued and asserted that it was clear from the above that Appellant did not have the rice to deliver and was attempting to purchase it during the period it should have been shipping. These latter two charges are evidently drawn by inference from the

above letter. In deciding this appeal, this material is a factor. However, to prevail, CCC does not have to establish that Rice could not ship. The contract places the burden of establishing that point on Rice. Appellant has not provided us with adequate evidence to find it was ready. (FF 2.)

In addition, we need to also point out that the Board clearly identified the matter of readiness to ship as a disputed issue and did so prior to the closing the record and accepting briefs. As is evidenced by the Board's memorandum of a telephone conference of March 25, 2004, the parties were aware that there was a disputed issue over the readiness to ship and that the matter would be in issue in the appeal proceedings. (FF 28.) The parties had the opportunity to present evidence through a hearing or on the record as to readiness. Here, the parties chose to go on the record. Choosing to go on the record does not change the fact that in order to prevail one must produce adequate evidence. In this case the issue of preparation for shipping was clearly in play and Appellant has failed to provide adequate evidence to establish that it would have met that criteria. On the evidence presented, we must find that Appellant did not show that it was prepared to ship in accordance with the schedule and as such, the CO had the right not to pay the liquidated damages and to conclude as he did.

The parties agreed to be bound by the contract. In requiring the contractor to furnish the evidence, Article 65 is simply assuring that CCC is not paying liquidated damages for delays that would have occurred even without the late notice. CCC has the right to limit liquidated damages in that instance. For us to find on this record in favor of Appellant would have us rewrite that aspect of the agreement and give no meaning to the requirement to establish the readiness.

DECISION

The Board denies the appeal as to all shipments.

HOWARD A. POLLACK
Administrative Judge

Concurring:

JOSEPH A. VERGILIO
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
June 13, 2005